

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



DEMERIS TOLBERT

Plaintiff,

v.

19-CV-1691 (JLS) (JJM)

CO DUSZA, CO BRANDON ROBERTS,
CO ERIC SCHUESSLER, SGT. LONG,
DEPUTY SUPT. WILCOTT, DEPUTY
OF SECURITY CLARY, NP GRAF,
TARA HAY, CO HEEMAN, PA OAKS,
DR. SIDDIQI,

Defendants.

DECISION AND ORDER

Plaintiff Demeris Tolbert, a prisoner, brings this action seeking relief under 42 U.S.C. § 1983. *See* Dkt. 71. He alleges that Defendants violated his rights under the Eighth Amendment to the United States Constitution while he was incarcerated at Attica Correctional Facility and Southport Correctional Facility. *See id.* The case has been referred to United States Magistrate Jeremiah J. McCarthy for all proceedings under 28 U.S.C. §§ 636(b)(1)(A), (B), and (C). Dkt. 36.

Before the Court is Defendants' motion to enforce settlement. Dkt. 159. Defendants filed their motion on August 8, 2023 seeking enforcement of an agreement that allegedly resulted from a telephonic discussion between Plaintiff and Counsel for

Defendants. *See id.*¹ They filed a supplemental submission on August 21, 2023. Dkt. 161. Plaintiff opposed Defendants' motion, Dkt. 168, and Defendants replied. Dkt. 170.

On December 8, 2023, Judge McCarthy issued a Report and Recommendation ("R&R") recommending that that this Court deny Defendants' motion to enforce settlement. Dkt. 173.² Defendants objected to the R&R, arguing that, "under the *Winston* test, the Court should enforce the parties' oral settlement agreement and dismiss the case." Dkt. 174. Plaintiff responded in opposition, Dkt. 176, and Defendants replied. Dkt. 177.

A district court may accept, reject, or modify the findings or recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). A district court must conduct a *de novo* review of those portions of a magistrate judge's recommendation to which a party objects. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). But neither 28 U.S.C. § 636 nor Federal Rule of Civil Procedure 72 requires a district court to review the recommendation of a magistrate judge to which no objections are raised. *See Thomas v. Arn*, 474 U.S. 140, 149–50 (1985).

This Court carefully reviewed the R&R, the objections briefing, and the relevant record. Based on its *de novo* review, the Court accepts Judge McCarthy's


¹ Although Plaintiff was proceeding *pro se* at the time of the alleged agreement, the Court has appointed *pro bono* counsel "to assist [Plaintiff] with any future settlement talks" and, "if necessary, to oppose defendants' motion to enforce the settlement." *See* Dkt. 160.

² Prior to issuing the R&R, the Court docketed e-mail correspondence between the Court and counsel regarding Defendants' position on issues raised in their motion. *See* Dkt. 172.

recommendation. For the reasons stated above and in the R&R, this Court DENIES Defendants' [159] motion to enforce settlement. The case is referred back to Judge McCarthy consistent with the April 30, 2021 referral order. *See* Dkt. 36.

SO ORDERED.

Dated: January 23, 2024
Buffalo, New York



JOHN L. SINATRA, JR.
UNITED STATES DISTRICT JUDGE